APPENDIX A.

Opinion of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of America, Appellee. No. 14,464.

June 18, 1956.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges.

PER CURIAM:

During the trial of defendant, who is a lawyer, on several counts of contempt alleged to have been committed before a United States Marine Corps Court of Inquiry,[1] the United States District Judge warned Shibley, who was acting as attorney in his own defense, that he was contemptuous of the District Court. After verdict, the trial judge ordered the matter of summary contempt to be brought before the court at a later date. A Certificate of Contempt of George E. Shibley was entered on a date considerably postponed,[2] and, based thereon, the trial court adjudged Shibley guilty and sentenced him to imprisonment for thirty days.

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[1]See United States v. Shibley, 112 F. Supp. 734.

[2]The trial was concluded on November 20, 1953, at which time the court ordered the matter of summary contempt be brought before the court on November 23, 1953. At that time, the matter was postponed to December 7, 1953, and then again to December 28, 1953, for the reason that the reporter had been unable to transcribe completely the important portions of the voluminous record. On the twenty-eighth, the matter was again postponed at the behest of appellant because of illness until January 18, 1954, at which time the certificate was filed and appellant sentenced.

The Certificate of Contempt is a voluminous document based upon actions, words and conduct of Shibley, an attorney, in open court, which were heard, seen and observed by the trial judge presiding, according to the declarations therein contained.

The record bears out the statements of the certificate in essential particulars. The evidence was amply sufficient to sustain the charges.

There is no question but that Shibley abused his position as lawyer for himself as defendant. He consistently spoke and acted with complete contempt of the court. He attempted to and fairly succeeded in taking complete control of the trial, because of the attempt of the trial judge to act as an impartial arbiter and because the trial judge refrained from criticizing the conduct of Shibley before the jury as far as possible. Specifically, Shibley, continuously and contrary to the rulings and directions of the judge, insisted on bringing before the trial jury, in opening statement and other places during presentation of evidence and in final arguments, the merits of the case in which Shibley had represented one Babette before a Marine Corps court-martial, charges which Shibley had made against Marine Corps officers on which the Court of Inquiry had been convened, and constantly ignored directions and rulings of the court.

Shibley has not the excuse in this instance that he, as a lawyer, was misled by zeal in attempting to do his duty to his client. We hold that many of the acts set up in the certificate were in contempt of court. It would be a

travesty to hold that the right of an accused to "fearless, vigorous and effective advocacy," no matter how unpopular the cause, justified the contemptuous behavior of Shibley in his own behalf.

Many of the recitals of the certificate might not state specific acts which were of themselves contemptuous, but they give color and emphasize the necessity of the judgment as to the particulars of conduct recited.

Shibley complains that the certificate was not filed until two months after the verdict. This delay is not important. Indeed, it indicates the trial judge was not acting inconsiderately, but with due deliberation. The fact that there was no hearing on the certificate and that due process was thus lacking is untenable. Such delay until after trial has been given formal approval by the courts.[3] Nevertheless, such delay has its danger, as has been pointed out. If there is a conviction, then a subsequent penalty for contempt appears to the unthinking as a cumulative and vindictive punishment. But where there is a verdict of "not guilty," as in this case, the charge can always be made, as it has by the lawyer defendant here, that the trial judge was disappointed at the verdict and therefore assessed a punishment for contempt. But the record here, cold as it is, is replete with evidence of such utterly contemptuous conduct that a trial judge would have been recreant to his duty if he had failed to notice the assault upon the dignity of the tribunal, whatever the verdict

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[3]Offutt v. United States, 348 U. S. 11; MacInnis v. United States, 9 Cir., 191 F. 2d 157, 161, certiorari denied 342 U. S. 953.

were. Although, in our opinion, this might well have been done early in the trial, the action then might have required a mistrial. Here there is the advantage of tabulation of a cold, consistent, calculated design to influence the jury by utterly extraneous matter, which was in the main successful. This lawyer defendant is brazenly citing the success of his contemptuous behavior as a reason for relieving him of its consequences.

It is also suggested that, since the trial judge, after verdict had been rendered and the jury discharged from consideration thereof, had in the presence of the jury expressed his opinion of the conduct of defendant at the Court of Inquiry and of the failure to bring in a verdict of guilty, he was then biased and could not enter the certificate. There is nothing to this contention. The trial judge, throughout the trial, exercised admirable self restraint before the jury. He would have had a perfect right to comment on the evidence during instruction if he did so fairly. The fact that he did not and refrained from an expression to the jury of the conduct of defendant during the trial may have resulted in this result which he thought unjust. He had a right to say he thought so. There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the Court of Inquiry and before him. He had the right officially to express himself as to both. Because he had a firm opinion, based upon the evidence in the case and upon the action of defendant before him, is the fault of defendant and not of the court.

This Court therefore affirms the judgment that Shibley was guilty of contempt. However, a long time has passed since the judgment was rendered. Meantime, Shibley has been convicted of a criminal charge which was argued on appeal at the same time the instant case was argued.[4] Several counts of the original information have not yet been determined by a jury. This Court has no control over the penalty, which is entirely in the discretion of the trial court.[5] It is the opinion of this Court that, without expressing any opinion as to the ultimate result, the cause should be remanded to permit the trial judge to consider the sentence in view of the conditions which now exist.

We deny the request of Shibley to dismiss the remaining counts of the information against him for contempt of the Court of Inquiry.

Remanded for consideration of sentence.

(Endorsed:) Per Curiam Opinion. Filed June 18, 1956. Paul P. O'Brien, Clerk.

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[4]See Shibley v. United States, 9 Cir., ... F. 2d ..... (No. 14,465, filed March 19, 1956).

[5]MacInnis v. United States, 9 Cir., *supra*, at p. 162.

APPENDIX B.

Judgment of the Court Below.

United States Court of Appeals for the Ninth Circuit.

George E. Shibley, Appellant, vs. United States of American, Appellee. No. 14,464.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause that Shibley was guilty of contempt, be, and hereby is affirmed, and that this cause be, and hereby is remanded to the said District Court to permit the trial judge to consider the sentence in view of the conditions which now exist.

(Endorsed) Judgment. Filed and Entered: June 18, 1956. Paul P. O'Brien, Clerk.

APPENDIX C.

Statutes Involved.

A. Title 18, U. S. C., Section 401:

"POWER OF COURT.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701."

B. Rule 42, Federal Rules of Criminal Procedure:

"CRIMINAL CONTEMPT.

(a) *Summary Disposition.* A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) *Disposition Upon Notice and Hearing.* A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constitut-

ing the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except, with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

APPENDIX D.

The certificate of contempt [C. Tr. 670-85] contains 16 specifications. There are no record references. It is important to note that the certificate was prepared some time after trial [C. Tr. 670], that the trial judge ordered only small portions of the record transcribed [R. 2574], and that in the main the general conclusions set forth in the certificate were based upon a recollection of past events infused with the trial judge's overt disappointment at the result of the trial.

SPECIFICATION "I" [C. Tr. 670].

Here it is stated that the trial judge relies on the series of alleged contempts set forth in "Paragraphs IV to XIV" [C. Tr. 670].

SPECIFICATION "II" [C. Tr. 670-7].

A. Although this specification covers more than one-half of the certificate, it has not been charged as a contempt, as the first specification above indicates. The Court of Appeals stated that specifications such as these give "color and emphasize the necessity of the judgment as to the particulars of conduct recited" (App. A, p. 3). When a trial judge, however, announces at the termination of a trial that he believes a contempt was committed, and in subsequent weeks searches solely his memory to fortify his conclusions, the danger exists that those matters which rise to the surface may take on an appearance wholly inconsistent with the actual record.

The core of Specification "II" is the trial judge's retrospective view that the trial consumed "approximately 17 trial days" when it could have been otherwise tried "in not exceeding 4 to 6 days" [C. Tr. 677]. When the trial

judge imposed the sentence of imprisonment upon petitioner two months after the trial, he stated. "This case should have been tried in eight days, eight trial days, 10 at the outside" [R. 2572]. During the trial, the trial judge stated to the jury [R. 1119]:

> "I want to say this further. We have had a lot of delays in this case, but the case is a novel case, in that we have a new military code of justice, a Uniform Code of Military Justice, that has been passed by Congress, we have regulations which have the effect of law which have been put into effect by the Secretaries of our armed forces, and the President of the United States, and whenever you get a case that involves a new field of law you have problems, problems that concern legal principles. So this case is not a case like a simple assault and battery, where you try out the question of whether somebody hit somebody and whether they had justification for doing it.
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> As a result, the court has had to determine on its own, in your absence, various questions of law, and has from time to time determined what part of the case you may hear. So let's understand that it is an intricate case involving many interesting problems."

The retrospective decision of the trial judge to place the onus for the alleged delay in the trial upon the petitioner is without support in the record. The first eight days of the trial on this nine-count information were consumed by the prosecution's case [R. 1-1022]. Motions to dismiss, selection of the jury, opening statements all took place on the first day [R. 1-173]. The second day was opened by the trial judge with a tenative view of "how this case will be tried" [R. 181-91], with both sides then being asked to express their views [R. 193-252]. The

same day the prosecution called its first witness, and the trial judge ruled that the witness' testimony should not be in the presence of the jury [R. 248]. Direct and cross-examination followed [R. 290-9, 310-65]. On the third day, the trial judge adjourned the trial at noon on his own motion [R. 375], also stating that he had changed his position and that the testimony of the first prosecution witness would have to be before the jury [R. 371]. On the fourth day, therefore, all the testimony of the witness had to be retraced before the jury, and examination continued [R. 379-517]. On the fifth day, the first witness concluded and the second prosecution witness was called to testify [R. 522-605, 625-37]. There were also proceedings on a *subpoena duces tecum* and another witness called out of order [R. 637-57]. On the sixth day, the second prosecution witness concluded, and a third began to testify [R. 676-805]. On the seventh day, the examination of witnesses was concluded in the middle of the day, when the prosecution sought to rest [R. 850]. The trial judge stated: "You are not ready to rest until some part of the transcript is before the jury. It raises the question as to what portion of the transcript should go before the jury" [R. 850]. Then followed discussion at the trial judge's request [R. 852-937]. On the eighth day, the prosecution rested, the trial judge having first read lengthy excerpts from the exhibits to the jury [R. 988-1022]. The certificate of contempt, as aforesaid, recites that the *entire* trial should have been concluded between *four and six days.*

On the ninth day, the petitioner's first witness took the stand [R. 1080]. The testimony was cut off by the trial judge, and an offer of proof was made [R. 1083-6, 1093-6]. The second witness was called the same day [R.

1099], and before the witness started to testify, the trial judge called for an offer of proof in chambers which was rejected [R. 1099-1117]. The court having indicated that it wanted an offer of proof before the next witness was called, such offer was made [R. 1121-2]. The witness was rejected [R. 1152], and the judge called for an offer of proof on the fourth witness [R. 1153-62], which was again rejected [R. 1162]. An offer of proof with respect to a fifth witness [R. 1168-78] was also denied [R. 1178]. On the tenth day, petitioner's expert witness testified on the discrepancies in the transcript of the court of inquiry [R. 1187-1225]. On the same day, petitioner took the stand to testify in his own behalf [R. 1225]. Petitioner was on the stand, direct and cross, on the eleventh day [R. 1330, 1445]. On the twelfth day, there was continued cross, redirect and recross [R. 1495, 1510, 1514]. Subject to certain matters to be submitted out of the presence of the jury, the petitioner rested [R. 1552]. Thus, the prosecution case had taken eight days; the petitioner's case reduced by the trial judge to four.

On the thirteenth day, the prosecution called rebuttal witnesses [R. 1598, 1718, 1743]. On the fourteenth day, a witness, a sound engineer, testified for petitioner [R. 1771] and some excerpts from the original sound belts involving the transcript were read. The petitioner testified briefly thereafter [R. 1915-33]. The prosecution rested [R. 1944]. The fifteenth day was devoted to discussion of instructions in chambers [R. 1952]. The sixteenth day continued with discussion of instructions and other related legal matters [R. 2058]. Summations were made on the seventeenth day [R. 2260, 2285]. Instructions were given on the eighteenth day [R. 2422-65]. The jury retired [R. 2479], and returned with their verdict of acquittal the next day [R. 2558].

It should also be noted that in most of this record aforesaid, petitioner did not participate at all. The trial judge, prosecutor and petitioner's associate counsel were active participants in the trial. The trial, it is submitted, was not impede or delayed by petitioner and was expeditiously tried. There is not the slightest evidence, in the actual record, that justice was obstructed.

B. The certificate alleges, apparently as an example of the reason for the purported delay in the trial, that a motion to dismiss the information was made prior to trial before another District Judge, and denied [C. Tr. 671]; that the trial judge ruled repeatedly that the pre-trial ruling would be followed, that the matters were binding on the trial judge and would not be reargued or reconsidered [C. Tr. 671-2].* Here is what the actual record shows:

> "The Court: Well, I will ask both counsel over the weekend to do some work on this, and I think our discussion this afternoon has pointed up the problem.
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> I certainly don't know the answer. But, Mr. Deutz [the prosecutor], it is not a problem that you can snuff off easily and say, 'There is no merit to it.' It presents a nice question. ***And with all respect to Judge Yankwich, who said his decision would settle all the problems in the case, I am afraid that it didn't.***

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*The decision on the motion to dismiss prior to trial is reported in 112 F. Supp. 734. The opinion was based on a misconception of the facts, as the subsequent trial revealed. The District Court treated petitioner's charges against the military officers as some attack on a court-martial when actually the charges were made during a pre-trial investigation and before any military court was convened. The ruling that petitioner's privileges were waived as a matter of law, however doubtful this position may have been legally, depended in any event on a factual showing at the trial, as the trial judge later recognized.

Mr. Marshall: It didn't obviously.

The Court: *Because it was on a motion to dismiss and it wasn't on the trial of the case"* [R. 726-7]. (Emphasis supplied.)

C. Another instance furnished in the certificate of contempt for the alleged delay in the trial is the matter of petitioner appearing as his own counsel. It is alleged that petitioner first appeared as his own counsel at the beginning of the trial when the trial judge would not permit petitioner to have associate counsel, but that petitioner's objections and motions were so "voluminous, wordy, rambling, repetitious and far-fetched" [C. Tr. 672], that the trial judge reconsidered his ruling and permitted Mr. Daniel G. Marshall to act as associate counsel.

The evidence in the record does not support the conclusion contained in the certificate. At the very beginning of the trial, the petitioner appeared as counsel for himself in association with Mr. Marshall. The trial judge demurred: "He can defend himself or he can have an attorney, but he can't do both. . . . I call your attention, also to the old axiom that a man who is his own attorney has a fool for a client" [R. 34-5]. Petitioner explained why he was then compelled to appear for himself [R. 36-7], stated to the court that he was not familiar with the rules of procedure in the federal court, and the trial judge stated that "we will see that you protect your record" [R. 37].

Petitioner was thus compelled to appear for himself, but in the period when he was not permitted to have associate counsel there does not appear to have been any delay in the trial because of petitioner's objections or motions, as the certificate of contempt indicates. The first

day of the trial saw the selection of the jury [R. 41-116], a discussion in chambers concerning the exclusion of witnesses [R. 127-40], and the opening statements to the jury [R. 140-75]. The second day of the trial witnessed the trial judge's initiation of a legal discussion as to how the case was to be tried [R. 181-91]. Both the prosecution and the petitioner, at the court's invitation, participated in the discussion [R. 193-247]. Then came the calling of the first prosecution witness and the ruling by the trial judge that the witness' testimony would be out of the presence of the jury [R. 248-99]. At the opening of the trial the next day, the trial judge voluntarily stated: "I am going to permit Mr. Marshall to participate as counsel . . . The case is complicated here because the defendant is in pro per, and he is also a lawyer . . . I think it might assist Mr Shibley and might assist the court to have Mr. Marshall's participation. . . . Does that meet with your approval . . . Is that what you want?" [R. 308-9]. Thus, only the first two days of the trial were marked by petitioner's appearance solely as his own counsel and patently there was no delay in the trial because of petitioner. Actually, almost one-half of the transcript of the proceedings of these two first days was consumed without petitioner's participation at all [R. 1-303].

D. Having thus permitted petitioner to be associated with counsel, as aforesaid, the trial judge in retrospect appears to adopt the view in the certificate of contempt that it was inappropriate for petitioner to participate thereafter. It is stated that the trial judge advised petitioner that "he was creating a record of such size and length that if convicted he might be financially unable to pay for the transcribing and printing of a record on ap-

peal" [C. Tr. 673], but that "notwithstanding such advice and caution by the court, defendant George E. Shibley continued to actively participate in the trial and to continue with objections, contentions and arguments as stated above" [C. Tr. 673]. It is, of course, nowhere asserted that petitioner participated in the trial without consent of the trial judge; the vice appears to be that petitioner participated too fully.

The evidence in the record presents a different picture. The so-called "advice and caution" was given to petitioner on the ninth day of the trial [R. 1162]. It came after a rejection of an offer of proof by petitioner, as witness after witness for the defense was denied the right to testify. Much of Specification II [C. Tr. 673-7] deals with the retrospective recollection of the trial judge that petitioner's objections and offers of proof were "needless" and "unnecessary." Yet, the very offer of proof which elicited the court's impatient "advice" came as a result of the trial judge's own invitation. "In view of what has happened on your first three witnesses [none had been permitted to testify], I think it is only fair that I request a general statement of what you expect to prove by the next witness you call" [R. 1150]. The trial judge cautioned counsel during the trial to be careful in their offers of proof: "I submit, to perfect your record, you have to show that you desire or made an offer that these privileges, which you say raises questions of fact, be given to the jury" [R. 1474]. At the very inception of the trial, the court admonished petitioner to watch his record. "We will see that you protect your record. It is only fair that a record be made, . . . that your record is preserved" [R. 37]. At another point in the trial, petitioner's counsel offered to prove certain legal advice petitioner had re-

ceived from Judge Robert Walker Kenny relative to petitioner's legal rights before the military court of inqury [R. 1121-3]. The offer of proof was rejected [R. 1123-32]. Two days later, the court on its own initiative stated: "There still is the question of whether Kenny's testimony might be admissible on some other theory, and maybe I slammed the door too fast and too hard" [R. 1405].

It is submitted from all the aforesaid that Specification II not only fails to reveal any contempt of court, but the actual evidence in the record which the courts below appear to have overlooked in no way gives "color" or "emphasizes the necessity" of the judgment of contempt herein. The actual record shows that the limited participation of petitioner in the trial was not a cause for its alleged delay; that the case was in fact expeditiously tried; that the case was an "intricate" one as the trial judge stated during the trial and as revealed in his instructions [R. 2422-65]; that the litigation was vigorously and properly contested by both sides; that justice was done with the return of the verdict; and that no cause existed for the post-trial invocation of the drastic contempt power in summary proceedings.

SPECIFICATION "III" [C. Tr. 677].

This is another specification which the trial judge did not specify as a "criminal contempt." It contains no facts. The conclusions of law merely state generally that the contempts alleged in specifications "IV" to "XIV" were done with a wilful state of mind. Petitioner at the time of imposition of sentence in January, 1954, disclaimed any intention to be in contempt of court and reminded the court of his respectful demeanor and conduct through-

out the trial [R. 2593-7]. This was not disputed by the trial judge: "Why you did it is hard to understand . . . if lawsuits were permitted to be conducted as you attempted to conduct a lawsuit in this court . . . you wouldn't have fair verdicts . . . I take into account . . . that you had gone through a lot of mental turmoil" [R. 2598]. During the trial, as the trial judge appeared to overlook, there had never been an adjudication of such wilful misconduct.

SPECIFICATION "IV" [C. Tr. 677-78].

Again, this first "particular conduct" which the certificate describes as a "contempt" contains no facts at all. It is again alleged generally that petitioner's motions, objections and offers of proof were "repetitious, unnecessary and improper," and that petitioner delayed and impeded the trial and "interfered with administration of justice by such conduct." Instead of a recital of facts to support these conclusions, the specification concludes with the statement that "an inspection of the entire record is necessary in order to see the nature and extent of such conduct" [C. Tr. 678]. These charges, made at large, are not consistent with the requirements of Rule 42(a) or 18 U. S. C. 401. In a summary contempt proceeding, the trial judge who metes out the punishment is usually the injured party and the prosecutor as well. Essential fairness requires under such circumstances that a certificate of contempt recite in detail the facts constituting the alleged misconduct rather than the bare conclusions of the trial judge.

SPECIFICATION "V" [C. Tr. 678-9].

This is the first specification to state any facts at all. It is alleged that one of the prosecution witnesses, "Lt.

Col. Anderson," was on the stand when cross-examination started at 4:10 p. m. "The examination in chief had been very brief and limited to only one or two matters" [C. Tr. 678]. Petitioner allegedly began a course of conduct "aimed at delaying and impeding the trial" [C. Tr. 678]. It is alleged that petitioner looked at the clock, asked questions, withdrew questions, asked that questions be reread, asked questions "to which objections were sustained" because "outside the scope of direct examination" and made "long and wordy speeches and arguments." It is alleged that petitioner continued to delay the examination although "repeatedly" ordered to proceed and complete the cross-examination. The court, it is stated, advised petitioner that the examination would be completed even if it went beyond 4:30 p. m. (the usual adjournment time), but petitioner stated that he was "inadequate" and engaged in an "emotional scene" before the jury, and the court adjourned for the day.

The evidence in the record is quite to the contrary, it is respectfully submitted. Lieutenant Colonel Earl E. Anderson [R. 786] was not a routine witness. He had been counsel to the military court of inquiry; had been the person who prepared and served the subpoena on petitioner while petitioner was engaged in the Bennette court-martial proceedings; had tendered petitioner the alleged witness and mileage fees, and was familiar with the events which involved petitioner's claim that he had been excused from further attendance at the court of inquiry on two occasions.*

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*This latter issue, covering a number of counts of the information, was important at the trial, as witness the trial judge's instructions [R. 2448-51, 2453-58].

As to the assertion that the direct examination of this witness had been "very brief and limited to only one or two matters," here is the record: The witness having been sworn, the prosecutor asked to have three exhibits marked for identification, 7, 8 and 9 [R. 7861-7]. The first exhibit appeared to be the original subpoena. The other two appeared to have just been received by the prosecutor by "airmail," and petitioner inquired if these two "could be deferred until Mr. Marshall is here tomorrow morning" [R. 787]. The trial judge agreed that the offer of the two exhibits should be postponed "until tomorrow morning" [R. 788]. Mr. Marshall had been excused, as stated by the court in the certificate, from attendance at the trial for that day. The witness then described his background [R. 789]. He was asked if he served the subpoena upon petitioner; shown the original document; asked if there was a "certification" on the document; who had made the certification; whether he recognized the signature of the certifying officer as well as his own; whether he had served a copy upon petitioner; and whether he had paid witness fees to petitioner [R. 789-91]. The Colonel described the fees he had paid petitioner, the amount of witness fees and the amount of mileage fees [R. 791]. The trial judge inquired of petitioner if there was any contention that the proper mileage had not been paid [R. 791]. Petitioner stated that he had never tried to figure it. "May I reserve that question until Mr. Marshall comes in" [R. 791]. The court then promulgated a series of questions to the witness on the issue of mileage fees [R. 791].

Still continuing with the same witness on direct, the prosecutor showed the witness two other exhibits, 1-A and 2 [R. 791]. These were, respectively, the original

transcript of the court of inquiry and the partial transcript certified by the military to the United States Attorney. The witness was asked to identify his signature on each document [R. 792]. This authentication was made necessary by the strict requirements of the Uniform Code of Military Justice, 50 U. S. C. 731(h). The prosecutor then offered the original subpoena in evidence [R. 792]. Petitioner stated (it was now about 4:10 p. m.). "I wonder, your Honor, if all these matters could be deferred until morning? I really don't know any of the technicalities about this. I think Mr. Marshall is acquainted with it, and I would appreciate his being here" [R. 793]. The trial judge asked the witness: "Will you be back tomorrow morning, Colonel?" [R. 793]. The witness answered: "Yes sir." The Court: "All right. Renew your offer tomorrow, Mr. Deutz." [R. 793]. The trial judge inquired if petitioner would like to cross-examine the witness and petitioner replied that he would [R. 793].

This was the "very brief and limited" direct examination referred to in the certificate of contempt. It should be noted that the examination had proceeded without a single objection interposed by petitioner [R. 789-93].

The cross-examination of the witness began by a question as to whether the certification of the transcript [Ex. 1-A] was, to the witness' knowledge, true and correct [R. 794]. *This was the first question by petitioner.* Here is what occurred: "The Court: Now, Mr. Deutz [the prosecutor], that is just exactly what I anticipated when I asked you what you were going to ask this witness. . . . I will entertain a motion to strike. . . . I am not going to open up for cross-examination this entire line of questioning. . . ." [R. 794]. "Mr. Deutz: I so move. . . . The Government's motion

is that as to Exhibits 1-A and 2, that the testimony be stricken as to identification of signatures" [R. 794]. "The Court: Any objection to that, Mr. Shibley?" [R. 794]. "Mr. Shibley: I think Mr. Deutz, Government counsel, having done that, that I respectfully urge that it is prejudicial for the Court to move to have it stricken, simply to deprive the defendant of cross-examining Col. Anderson" [R. 794]. "The Court: . . . I have other business to attend to, Mr. Shibley. We have jurors here who have left their business to attend here, as a civic duty . . . and I don't anticipate that further cross-examination as to this record will be in the interests of justice or would be of any assistance to you. In fact, to the contrary, I think it might be of advantage to yourself in not having the record further encumbered with cross-examination on this record. . . ." [R. 795].

All of this was before the jury. Petitioner had asked only one question, a proper one as the trial judge recognized. Petitioner uttered not one retorting word after the lengthy remarks of the judge [R. 795-6]. Petitioner inquired as to what issues were left other than identification of the witness and his background [R. 796]. The trial judge replied that there remained "his identification of the subpoena, Exhibit 7, and his testimony as to serving it" [R. 796]. The examination proceeded solely on those issues [R. 796-802]. Only one question appears to have been reread and withdrawn [R. 797]. There were two objections by the prosecutor, both overruled [R. 796-801].

In the light of the aforesaid, it is plain that the conclusions recited in the certificate are in conflict with the actual record, undoubtedly due to the trial judge's reliance solely on a recollection invoked months after the

trial. Petitioner's opportunity for cross-examination could not have comprised more than 10 or 15 minutes and he had no reason to seek delay since the trial court normally adjourned at 4:30 p. m. and the judge, counsel and witness all understood that the examination would continue the next day. If there were involuntary glances at the clock in the courtroom as the trial day came to its conclusion, there appears to be no basis to infer from such glances a deliberate intent to obstruct justice, when the record reflects no attempt by the petitioner to delay his examination nor any reason for doing so.

It is true that at about 4:30 p. m., the Court suddenly stated: "We are going to continue this evening until we conclude this cross-examination, Mr. Shibley" [R. 802]. Petitioner stated, then, that "in order not to inconvenience the court" he had proceeded in the absence of associate counsel, but that he had had little sleep during the past weekend and in the light of his physical condition, he thought perhaps time could be saved if he had a night's rest.* Petitioner stated that he would like the advice of associate counsel who had been excused for the day, in order to avoid doing anything prejudicial to petitioner's cause [R. 803]. Petitioner also pointed out to the court that in the light of the prior remarks by the court in the presence of the jury about the needlessness of further cross-examination, petitioner did not wish to appear to be imposing on the jury [R. 803]. He stated that he frankly felt inadequate to proceed without the advice of counsel and would forego his cross-examination over

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*Petitioner is a disabled war veteran. The court was familiar with his condition prior to trial [C. Tr. 264-72]. Petitioner was hospitalized soon after the trial [R. 2584]. The trial judge at the imposition of sentence recognized that the statements of ill-health were made in good faith [R. 2598].

objection [R. 804]. The trial judge then stated that it had not intended to fix any limit on petitioner's cross-examination and court was adjourned [R. 804-5].

The record does not show "any emotional scene before the jury" [C. Tr. 679], except perhaps as reference to one's state of health may be impatiently equated with "emotion." The next day the trial judge permitted associate counsel, as petitioner had requested, to continue cross-examination [R. 816]. The judge stated to the jury: "Any man who defends himself labors under a disadvantage, and I think it is only fair to permit Mr. Marshall to conduct cross-examination this morning, . . ." [R. 817].

It is submitted that specification "V", examined in the light of the record, fails to establish a contempt of court.

SPECIFICATION "VI" [C. Tr. 679].

During the trial, and while petitioner was in the process of adducing evidence in his own behalf, the trial judge decided to work on the settling of instructions [R. 1580]. The judge permitted petitioner to be excused from attendance, to prepare certain evidence for trial, leaving petitioner's associate to take care of the matter. "The Court: All right. Court will stand adjourned until Thursday morning at 9:30. Counsel will meet with the court in chambers to work on the instructions." [R. 1582]. The record does not reflect what happened thereafter, but the trial judge recites in the certificate that he invited certain officers of the Marine Corps to attend the session in chambers as observers [C. Tr. 679]. The petitioner thereafter assigned this action of the trial judge as misconduct [R. 1810]. The trial judge two months after the trial holds such assignment to be a contempt of court.

It is respectfully submitted that such legal objection is clearly not a contempt of court. It is not a contempt of the court's authority, if litigation is to be fair and advocacy unfettered, to advise a court that its action does not give the appearance of impartiality, so necessary as impartiality itself. As petitioner pointed out, the trial judge had invited into his chambers, during the trial and before the close of the defense, "these officer witnesses from the Marine Corps, who are really adverse to the defendant" [R. 1810]. If the court considered the proceeding in chambers to be no different from the proceedings in the courtroom, then perhaps it might be urged that other interested segments of the public might have been invited by the court on its own motion within reason to avoid any aspect of partiality before the trial was concluded. Clearly, it was not a contempt of court to bring this matter to the court's attention by the assignment of misconduct, even if the court felt that the assignment was without merit.

Specifications "VII", "VIII", "IX" and "X" [C. Tr. 679-81].

We bring these specifications together because the matters are all interrelated, all arise from the same subject matter and occur on the same day. The gist of the charges contained in these specifications is this: It is alleged that the judge instructed petitioner that the truth or falsity of petitioner's charges made originally against the military officers was not in issue and should not be argued, but petitioner argued the issue before the jury though "repeatedly ordered and warned by the court" [C. Tr. 681] not to do so; that petitioner alleged that the judge had intervened to protect the prosecutor but not petitioner; that petitioner accused the judge of bias and prejudice

against petitioner and in favor of the prosecutor; and that petitioner made an inappropriate statement when requesting a recess.

These allegations of "contempt" are so totally at variance with the record as to indicate the danger which flows from post-trial summary contempt proceedings based on a past recollection beclouded with the personal disappointment of the court at the result of the trial.

Prior to the day in question—this was the day of closing summations to the jury—the trial judge indicated to counsel *for both sides* that he did not believe that the question of the truth or falsity of the charges made by petitioner on behalf of his client to the Commandant at Washington, D. C., was an issue in the case. The question generally appeared to the court to be, in the light of the evidence and petitioner's claims of privilege, whether there had been an intentional refusal to answer the inquiries of the court of inquiry, and whether petitioner had actually been excused from attendance under the facts of the case.

With this background, the prosecutor was the first to open to the jury. Despite the admonition of the court, *the prosecutor* informed the jury that petitioner had "made some rather broad and poorly defined charges" against the military officers [R. 2261]. *The prosecutor* stated that petitioner had raised before the court of inquiry "a number of what were actually false and phony privileges. And he did this for the sole purpose of frustrating the court of inquiry in its attempts to secure the facts" [R. 2265].

> "I don't think after you read this that you will feel that this action by Shibley is an honest and sincere attempt by him to substantiate his charges of

> misconduct. . . . But that isn't true of Shibley. He is not that type. *He is the type to make accusations, whether they be true or not, and he is not prepared to back them up*" [R. 2266]. (Emphasis supplied.)

Petitioner objected to the statement [R. 2266]. The judge told the jury only that petitioner's character as a good or bad man or whether he was a good or bad lawyer was not in issue [R. 2267]. The prosecutor was told to proceed [R. 2267]. Here is how the prosecutor proceeded.

> "It is our belief, and I believe you will conclude, that Mr. Shibley's tactics were clearly to obstruct the court of inquiry and to prevent it from getting the facts. *Frankly, they are facts which would prove that Shibley was a liar.* I hate to use that statement in regard to somebody that is a member of the bar, but you can draw your own conclusions" [R. 2274]. (Emphasis supplied.)

Here was continued and flagrant disregard of the court's directions by the prosecutor. There was no reprimand. The only remark after these statements was this: "The Court: Now, the truth or falsity of the matters about which questions were asked is not an issue in this case" [R. 2274]. "Mr. Deutz: I understand that" [R. 2274]. "The Court: Go ahead" [R. 2274].

Petitioner's associate counsel arose to remind the court that serious misconduct had been committed by the prosecutor [R. 2274]. The court told the jury to disregard the remark [R. 2275]. But the prosecutor persisted. The prosecutor maintained that petitioner had taken the stand and his credibility was involved [R. 2275]. Thus, the prosecution was not withdrawing its description of "liar," and all of this was before the jury. *The court now in-*

formed the jury that the prosecutor's statement was correct. "His credibility as a witness before the court is in issue" [R. 2275]. Petitioner's associate counsel assigned the remarks of the prosecutor as misconduct. Counsel pointed out that by turning the question into one of credibility, the prosecutor was palpably discussing the truth or falsity of the charges made by petitioner against the military officers, which the court itself had stated ought not to be argued [R. 2276]. Stated the court: "Your objections now made and previously made are overruled, Mr. Marshall. . . . *Mr. Deutz was within his rights to point that out*" [R. 2276]. (Emphasis supplied.)*

Petitioner opened to the jury in his own behalf. He proceeded with only slight interruptions for a considerable period of time [R. 2285-2303], until a point was reached when petitioner called the jury's attention to the prosecutor's remark "that Mr. Shibley is the kind of a person who makes charges but is unwilling to back them up" [R. 2303]. Here the trial judge intervened. It was now the court's position that petitioner could make no reference to this issue [R. 2303-4]. The court stated that it had ruled out this issue [R. 2305]. Petitioner pointed out that the prosecutor had made those statements, that they had not been stricken, a proper admonition had not been made, that the matter had been gratuitously brought into the case by the prosecutor, and that since the court did not intervene to protect petitioner in that respect, petitioner should at least have the right to reply on the record

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*The relations between the judge and prosecutor are exemplified by the following remarks of the court to the prosecutor during the trial: ". . . I have a high regard for you, I hired you to work for me . . . this is your first criminal case, and you will discover the trials of criminal cases aren't like the trials of civil actions, if you haven't discovered it already." [R. 1428.]

[R 2305]. Petitioner stated that he didn't want to argue anything improper before the jury, but felt himself unable to determine where the line should be drawn [R. 2306].

The court took a short recess and had part of the summation of the prosecutor reread together with the court's remarks [R. 2307-15]. The petitioner pointed out that all the court had done was to declare that the issue of the truth or falsity of the original charge was not before the jury, but the court had not ruled out the issue of credibility, whether petitioner was a "liar" and "the kind of a person who makes charges but is unwilling to back them up" as stated by the prosecutor, that all of the remarks of the prosecutor had not been striken and were implanted in the minds of the jury [R. 2316]. Objection was made to the court's constant intervention to protect the prosecution [R. 2316], with interference with the defense and the failure to protect petitioner in the things that were said by the prosecution [R. 2320]. The motions and objections were overruled [R. 2321]. The prosecutor stated that by his remarks he had not intended "to transgress on the question of the truth of what was said in the court of inquiry" [R. 2321]. "The Court: The less you say the better, probably, Mr. Deutz" [R. 2321].*

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*Directly after the aforesaid discussion, the jury was recalled to hear further summation [R. 2321]. Petitioner requested a five minute recess. The court thought that petitioner had just had a recess, but the petitioner explained the reason he had momentarily left the courtroom on the prior occasion, with the court's permission [R. 2307]. The trial judge, on subsequent recollection, apparently deemed petitioner's explanation in poor taste and specified it as a "contempt" [C. Tr. 680]. No such ruling was made during the trial, and indeed the court treated the incident lightly. Immediately after petitioner's explanation, the court stated: "We will take a short recess. How long do you want, Mr. Shibley?" Petitioner stated: "Five minutes, you Honor." "The Court: All right. I will give you seven." [R. 23228.]

There was no adjudication during the trial that petitioner had been in contempt of court, and indeed, on the aforesaid record, there could be none. The trial judge appears to have recalled after trial with some asperity that petitioner had assigned as error the actions of the judge which appeared to favor the prosecution in the cause and which prejudice the rights of petitioner, but grounds existed for these assignments and they were clearly not "contempts of court." Indeed, at the trial, the judge appears to have believed that petitioner's assignments were not without merit for after the aforesaid recess, the jury was recalled and for the first time, the remarks of the prosecutor were specifically itemized and the jury told to disregard them [R. 2322-24]. Petitioner then proceeded with his argument to the jury without any further interruption [R. 2324-42].*

With all due deference, it is submitted that it would be a palpable injustice on this record to stigmatize petitioner with "contempt." The courts below, it is submitted, have overlooked the evidence and placed the onus of a contempt

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*The Court of Appeals appears to have relied solely on the judge's certificate of contempt and the prosecution's arguments on appeal. As a result, it broadly states that petitioner, contrary to the judge's orders, raised the merits of the "court-martial charges" against his client as well as the merits of petitioner's charges against the military officers (App. A, p. 2). It is asserted that this occurred throughout the trial. No particular instance is cited, and even the trial judge made no such broad charge. There is no basis in the record to support these statements. If counsel on either side strayed into these issues during the trial, the judge simply reminded them that they were going afield. For example, after the petitioner completed his opening statements to the jury at the beginning of the trial, the judge stated: "As I told you, I don't want to limit you as far as your talking about the case to be tried. My interjections were only concerning matters that were not relevant to these issues" [R. 173]. But there never was the slightest indication that a "contempt" had been committed, and the general statements of the court below finds no factual support.

conviction upon petitioner in a manner totally inconsistent with law and the demands of fairness and justice.

SPECIFICATION "XI" [C. Tr. 681].

Here petitioner is held in contempt of court because, in chambers and out of the presence of the jury [R. 2465], petitioner assigned as error the manner in which emphasis was placed upon certain portions of the instructions [R. 2476]. It is not alleged that petitioner was not respectful in making his different objections, nor is there indication in the record that at the time the trial judge did not treat petitioner's objections as seriously made.

It is fundamental that a reading which singles out or gives undue prominence to a portion of the instructions of a court may seriously affect the rights of an accused. The single word or look of a trial judge may lead a jury to a decision of a doubtful case. It is not understandable why it was contempt of court for petitioner to raise the issue.*

SPECIFICATIONS "XII" and "XIII" [C. Tr. 682-3].

These two specifications appear to involve the same matter and we consider them together. It is alleged that petitioner made objections, and after the court had ruled, made further objections; that after petitioner had "three or four bites of the apple," the court halted petitioner

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*"How many of us have witnessed a situation where the judge's views were conveyed to the jury largely by means not appearing in short hand notes—by sharp fleers, by subtle inflections of the voice, by significant pauses or expressive glances? Yet the judge resorting to these tactics is often unconscious of the fact that he is usurping the functions of the jury more insidiously than if he came out directly and told the jury what he thought about the case."

Shientag, B. L., *The Personality of the Judge* (N. Y. 1944), p. 60.

because, as the court states, petitioner before the court of inquiry had repeated statements of privileges and then when halted by the court of inquiry stated, "May I state further privileges." A contempt is alleged because petitioner assigned as misconduct "the angry tone of voice" and "malevolent" look directed at petitioner [C. Tr. 683] during the court's attack upon petitioner's alleged misconduct.

The allegation that petitioner had had too many "bites of the apple" is without support in the record. On November 20, 1953, the day mentioned in the certificate, the jury had been deliberating for almost 24 hours [R. 2516]. Petitioner's associate counsel, as soon as the court convened, moved for a mistrial because of certain events which had occurred the night before and upon the further ground that the proceedings were resulting in a coercion of the verdict [R. 2515-28]. The court opened on November 20, at 11:45 a. m. [R. 2515] and these matters were discussed for about one-half hour [R. 2528] when an adjournment was taken. Petitioner had not uttered a word in these proceedings.

The court reconvened at 3:03 p. m. in the absence of the jury. A communication from the jury was read inquiring whether they were required to consider certain counts in the information if they reached agreement on other counts [R. 2529]. The judge asked for suggestions [R. 2529]. Petitioner's associate counsel moved for a mistrial upon grounds previously stated, which was denied [R. 2534]. The jury was recalled [R. 2533]. The court gave them various instructions, the gist of which was apparently intended to persuade the jury to reach a verdict on every count [R. 2534]. Petitioner had not yet made a single statement.

The court requested counsel to approach the bench and asked if there were any exceptions to its instructions [R. 2535]. The prosecutor had none [R. 2535]. For the first time in the day, the petitioner spoke only to request that petitioner's exceptions be stated in chambers, out of the view of the jury, because a "very critical period" had been reached and counsel was reluctant to have the jury see only the accused taking exceptions [R. 2536]. The request was granted [R. 2536].

In chambers, petitioner made one objection to the court's supplemental instructions upon the ground that in effect the instructions compelled a compromise verdict and did not sufficiently stress that the verdict of each juror must be based on his own independent judgment [R. 2537-38]. The court asked petitioner if there were any further grounds and petitioner stated that the court had in effect replaced its original instructions by the supplemental instructions and failed to apprise the jury of the law in the case [R. 2539]. The two objections were overruled [R. 2539]. The court asked petitioner's associate if he had any objections [R. 2539]. There was one objection advanced by petitioner's associate and some legal discussion [R. 2539-42], and the objection overruled [R. 2542]. Petitioner requested the court to give one of the proposed instructions (No. 39), and failing that, to instruct the jury that in the light of the presumption of innocence and the prosecution's burden of proof, a compromise verdict would not satisfy the requirements of the law [R. 2543-4]. These requests were denied, immediately followed with the outburst by the court against petitioner concerning "three or four bites of the apple" and petitioner's conduct "before the court of inquiry," followed petitioner's assignment of judicial misconduct [R. 2544].

These were proceedings in chambers. The entire proceedings could not have consumed more than ten minutes. The period in the trial was crucial and clearly, as the court recognized, some objections to its supplemental instructions, given to the jury who had been deliberating for more than twenty-four hours, were appropriate. Petitioner's objections were extremely few in number and appeared relevant. They were made respectfully. No reason appears in the record why the trial judge suddenly castigated petitioner, and it is not denied that the broad statements made by the judge and directed at petitioner were made heatedly, and it is not claimed that petitioner's assignment of judicial misconduct was made in any manner other than with due respect. It is submitted that this brief interchange in chambers at the end of the trial, initiated by the trial judge, did not justify the invocation of "contempt."

SPECIFICATION "XIV" [C. Tr. 682].

This alleged "criminal contempt" did not involve the court in any way. When the jury, after deliberating for 24 hours, returned to receive the supplemental instructions from the trial judge as aforesaid, the Chief United States Attorney and an assistant for the first time appeared in the trial and seated themselves at the counsel table in the immediate view of the jury [R. 2547]. After the jury retired, petitioner objected and noted that this had the appearance of putting pressure upon the jury to return a verdict against petitioner [R. 2547]. Petitioner's associate counsel also stated that this sudden appearance of the United States Attorney at the counsel table would have "a prejudicial effect to work coercion upon this jury to the damage of the defendant" [R. 2550]. The objections were overruled. The court, of course, never

indicated that such objections were a "contempt." They were certainly entitled to be made, it is submitted, since it does not impinge upon the prerogative of a prosecutor to urge that such sudden appearances by a public figure at a crucial period in the trial should be avoided in the interests of the appearance of justice.

SPECIFICATION "XV" [C. Tr. 683-4].

This specification merely rejects the affidavit of bias and prejudice submitted by petitioner.

SPECIFICATION "XVI" [C. Tr. 685].

This specification concludes that on the basis of specifications "I to XIV," petitioner, "an attorney at law," is in "summary contempt of this court."

It is submitted that on the actual record, the certificate and judgment of contempt are without support. The rights of litigants and their counsel under the fundamental law can hardly be maintained, it is respectfully submitted, if this drastic and unfettered extension of the contempt power by the courts below is permitted to remain as a precedent unreviewed by the Supreme Court of the United States.